Supreme Court, U.S
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No. _____

In The

Supreme Court of the United States

JEFFREY LEE BOKOR,
Petitioner,

v.

RICHARD L. HATTOX,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Is a prosecutor in one jurisdiction protected by absolute or qualified immunity in a 42 U.S.C. § 1983 claim that is based on that prosecutor's initiation of an arrest and prosecution in a separate jurisdiction in which the prosecutor had no legal authority to function as a prosecutor?

2. Is a prosecutor protected by absolute or qualified immunity in a 42 U.S.C. § 1983 claim that is based on the prosecutor's initiation of an arrest for a charge that was never supported by probable cause?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioner is Jeffrey Lee Bokor. Respondent is Richard L. Hattox who, during the relevant time period, served as the District Attorney of the 355th Judicial District of Texas. Neither party is a corporation.

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The Court of Appeals issued a one-page, unreported judgment, but did not issue a written opinion. (App. A). The District Court's opinion is unreported. (App. B). The Court of Appeals for the Second District of Texas issued a reported opinion in one of the criminal cases underlying this present suit. *Bokor v. State*, 114 S.W.3d 558 (Tex. App. 2002).

STATEMENT CONCERNING JURISDICTION

The Court of Appeals entered its judgment on November 13, 2006. (App. A). No motion for rehearing was filed. This Court's jurisdiction rests on 28 U.S.C. § 1254(1) and 42 U.S.C. § 1983.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated[.]"

The Fourteenth Amendment to the United States Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of law[.]"

42 U.S.C. § 1983 provides that "[e]very person who, under color of any statute, ordinance, regulation, custom, or

usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress[.]" 42 U.S.C. § 1983 (2000).

Article V, Section 17, of the Texas Constitution provides the following: "The County Court shall hold terms as provided by law. Prosecutions may be commenced in said court by information filed by the county attorney, or by affidavit, as may be provided by law." TEX. CONST. art. V, § 17.

Article V, Section 21, of the Texas Constitution provides the following: "A County Attorney, for counties in which there is not a resident Criminal District Attorney, shall be elected by the qualified voters of each county, who shall be commissioned by the Governor, and hold his office for the term of four years. ...The County Attorneys shall represent the State in all cases in the District and inferior courts in their respective counties; but if any county shall be included in a district in which there shall be a District Attorney, the respective duties of District Attorneys and County Attorneys shall in such counties be regulated by the Legislature." TEX. CONST. art. V, § 21.

Article 4.05 of the Texas Code of Criminal Procedure provides, in relevant part, the following: "District courts and criminal district courts shall have original jurisdiction in criminal cases of the grade of felony[.]" TEX. CODE CRIM. PROC. ANN. art. 4.05 (Vernon 2005).

Article 4.07 of the Texas Code of Criminal Procedure provides the following: "The county courts shall have original jurisdiction of all misdemeanors of which exclusive

original jurisdiction is not given to the justice court[.]" TEX. CODE CRIM. PROC. ANN. art. 4.07 (Vernon 2005).

Section 24.501 of the Texas Government Code provides that "[t]he 355th Judicial District is composed of Hood County." TEX. GOV'T CODE ANN. § 24.501 (Vernon 2004).

Section 43.179 of the Texas Government Code provides the following: "The voters of the 355th Judicial District elect a district attorney who represents the state in all cases before that district court." TEX. GOV'T CODE ANN. § 43.179 (Vernon 2004).

Section 31.03 of the Texas Penal Code provides that a person "commits an offense if he unlawfully appropriates property with intent to deprive the owner of property." Section 31.03 further provides that appropriation is unlawful if "it is without the owner's effective consent[.]" TEX. PENAL CODE ANN. § 31.03 (Vernon 2003).

STATEMENT OF THE CASE

This case involves a civil suit filed pursuant to 42 U.S.C. § 1983 by Jeffrey Bokor, the petitioner. Richard Hattox, the respondent, served as a felony prosecutor during the relevant time period. In 1999, Mr. Bokor was arrested in Hood County, Texas, and charged with misdemeanor stalking. A few months later, he was arrested a second time and charged with felony theft and another count of misdemeanor stalking. Mr. Bokor asserts that Hattox initiated each of these arrests. The misdemeanor charges were ultimately dismissed, and Mr. Bokor was eventually acquitted of the felony charge by a state appellate court.

Mr. Bokor lives in Granbury, Texas. He has been married to his wife Rhonda for more than 15 years, and he and Rhonda are the parents of two young boys. (1 R. at 99). During the time period relevant to this suit, Mr. Bokor worked in the real estate business. (1 R. at 100).

Mr. Bokor was originally arrested on December 2, 1999, and charged with the misdemeanor offense of stalking. Hattox filed the charge in the Hood County Court, and an individual named Garry Luker was listed as the alleged victim. (1 R. at 65-66, 99, 100). This stalking charge was dismissed on May 21, 2002. (1 R. at 69, 99, 103).

Mr. Bokor and Luker are former business associates. (1 R. at 100). Luker is an influential person in the Hood County community, and Hattox may have owned stock in a bank established by Luker. (1 R. at 249). In June of 1999, Mr. Bokor informed Luker that he had previously forwarded certain information to the Internal Revenue Service concerning Luker's business and accounting practices. (1 R. at 100). Luker was not happy. (1 R. at 100).

On April 26, 2000, Mr. Bokor was arrested a second time and charged with felony theft and a second count of misdemeanor stalking. (1 R. at 99, 102). Hattox initiated this arrest and the filing of these two charges. (1 R. at 73, 99, 102-03, 112-13). Hattox obtained a theft indictment on May 10, 2000. (1 R. at 73, 102). Mr. Bokor remained incarcerated until on or about June 14, 2000, when he was released on bond. (1 R. at 103).

The theft charge at issue in this case was based on a real estate transaction that involved Mr. Bokor, his wife, and an individual named David Trimble. (1 R. at 100-103, 105). Specifically, Trimble was purchasing certain real property from Mr. Bokor and his wife pursuant to a contract for deed. At some point, Luker began falsely asserting that he had a

lien against the real property that was the subject of the Trimble contract. (1 R. at 101-102).

Luker's assertion notwithstanding, it is beyond dispute that Trimble had not satisfied all of his obligations under the contract. (1 R. at 101-103). It is beyond dispute that, as of the date of the alleged offense, Mr. Bokor was under no legal obligation to deed the property to Trimble or refund the payments received from Trimble. (1 R. at 101-103, 105).

The theft case resulted in a jury trial, and Luker testified during the trial. (1 R. at 103). Although the jury found Mr. Bokor guilty of theft, the conviction was reversed on appeal, and the appellate court rendered a judgment of acquittal. *Bokor v. State*, 114 S.W.3d 558, 561 (Tex. App. 2002).

The second stalking charge was dismissed on May 21, 2002 (the same date of dismissal as the first charge). (1 R. at 103).

Mr. Bokor asserts that he was innocent of all three charges and that none of the charges was supported by probable cause. (1 R. at 6, 103). Further, Mr. Bokor asserts that Hattox lacked legal authority to initiate the misdemeanor arrests, as his jurisdiction was generally limited to felony prosecutions in the 355th District Court. (1 R. at 6, 100).

The District Court granted Hattox's motion for summary judgment, ruling that Hattox was protected by absolute immunity. (App. B at 7). The Fifth Circuit affirmed the judgment without issuing a written opinion. (App. A).

ARGUMENT

Although 42 U.S.C. § 1983 does not expressly acknowledge the existence of an immunity defense, this Court has held that Congress did not intend to abrogate those immunities that were well established at the time § 1983 was enacted. *Burns v. Reed*, 500 U.S. 478, 484-85 (1991); *Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993). The Court has recognized two kinds of immunities in § 1983 claims: (1) qualified immunity, which is available to most public officials; and (2) absolute immunity, which is generally available to prosecutors. *Buckley*, 509 U.S. at 268-270.

However, "the actions of a prosecutor are not absolutely immune merely because they are performed by a prosecutor." *Id.* at 273. Under the approach adopted by this Court, the focus is the function performed, not the identity of the performer, when determining whether the particular actions of a prosecutor should enjoy absolute immunity from a § 1983 action. *Id.* at 269. Absolute immunity does not, for example, protect a prosecutor's fabrication of false evidence during the preliminary investigation of an unsolved crime. *Id.* at 275. Likewise, absolute immunity would not apply in a § 1983 claim based on a prosecutor's legal advice to police officers. *Burns*, 500 U.S. at 492-96. The burden is on the prosecutor to show that he was functioning as an "advocate" for the state when engaging in the particular conduct at issue. *Buckley*, 509 U.S. at 274.

This case presents the Court with an opportunity to clarify whether a prosecutor is functioning as an advocate for the state in two situations: (1) the prosecutor initiates an arrest and prosecution in a jurisdiction or court in which the prosecutor is *not* authorized to function as a prosecutor; and

(2) the prosecutor succeeds in initiating an arrest in the absence of probable cause.

A. Absence of Jurisdiction

In the present case, Richard Hattox, the respondent, served as the District Attorney for the 355th Judicial District of Texas during the relevant time period. (1 R. at 100, 248). The applicable enabling statute authorized Hattox to represent the state in the 355th District Court. TEX. GOV'T CODE ANN. § 43.179 (Vernon 2004). The 355th Judicial District is composed of Hood County, Texas, and the District Court has original jurisdiction in felony cases. TEX. GOV'T CODE ANN. § 24.501 (Vernon 2004); TEX. CODE CRIM. PROC. ANN. art. 4.05 (Vernon 2005). However, in Hood County, a separate prosecutor, the Hood County Attorney, prosecutes misdemeanor cases in a separate court, the Hood County Court. TEX. CONST. art. V, §§ 17, 21; TEX. CODE CRIM. PROC. ANN. art. 4.07 (Vernon 2005).

Jeffrey Bokor, the petitioner, was originally arrested on December 2, 1999, and charged with the misdemeanor offense of stalking. Hattox initiated the arrest, and he signed and filed the corresponding information in the Hood County Court. (1 R. at 65-66). On April 26, 2000, Mr. Bokor was arrested a second time and charged with felony theft and another count of misdemeanor stalking. (1 R. at 99, 102). Hattox initiated this arrest as well. (1 R. at 73, 99, 102-03, 112-13).

The 355th District Court did not have jurisdiction of the misdemeanor cases (as evidenced by the fact that the cases were filed in a different court). *See* TEX. CODE CRIM. PROC. ANN. art. 4.05 (Vernon 2005); TEX. GOV'T CODE ANN. § 24.501 (Vernon 2004). Therefore, Hattox lacked jurisdiction to arrest and prosecute Mr. Bokor for the

misdemeanor charges. TEX. GOV'T CODE ANN. § 43.179 (Vernon 2004).

Texas law granted prosecutorial jurisdiction over these charges to the Hood County Attorney, and only the Hood County Attorney. (In fact, the Hood County Attorney is the official who ultimately dismissed these misdemeanor cases. (1 R. at 69, 99, 103).)

In short, Hattox proceeded in the clear absence of any jurisdiction when arresting and charging Mr. Bokor with misdemeanor stalking. Hattox initiated an arrest for a particular charge that he lacked authority to prosecute. Then, he did it again.

The District Court relied on *Barr v. Abrams*, 810 F.2d 358 (2d Cir. 1987), in ruling that absolute immunity nonetheless protected Hattox. (App. B at 4-5). (And the Fifth Circuit did not favor us with an opinion. (App. A).) It is not at all clear, however, that the prosecutor in *Barr* acted without jurisdiction. *Barr*, 810 F.2d at 361-62. *Barr* involved a criminal contempt charge that was later dismissed. *Id.* at 359-360. The judge who dismissed the criminal case noted that the particular offense, if properly charged, fell within the jurisdiction of the prosecutor who had filed the case. *Id.* at 362. Thus, the *Barr* prosecutor had not attempted to arrest someone for a charge that the prosecutor had no authority to prosecute. Further, the *Barr* prosecutor had not attempted to file a charge in another prosecutor's jurisdiction.

In addition, *Barr* predates *Burns* and *Buckley*, which fleshed out the functional approach used to determine the availability of absolute immunity.

Does a prosecutor enjoy absolute immunity from a § 1983 suit for actions that are not within the scope of the

prosecutor's jurisdiction? The prosecutor's jurisdiction, after all, delimits his role as an advocate for the state. If absolute immunity protects extra-jurisdictional conduct, is there nonetheless some limit? Are there some actions that could be so far removed from a prosecutor's jurisdictional boundaries that absolute immunity would no longer be available? This is an important question of federal law that has not been settled by this Court but is worthy of this Court's attention.

B. Absence of Probable Cause

Hattox eventually filed the theft case in the 355th District Court, but Hattox lacked probable cause to support Mr. Bokor's arrest for this charge. More specifically, not one scintilla of evidence supported a required element of the offense. *Bokor v. State*, 114 S.W.3d 558, 561 (Tex. App. 2002).

Under Texas law, the prosecution in a theft case must prove that the alleged victim is the owner of the property in question. TEX. PENAL CODE ANN. § 31.03 (Vernon 2003). Further, Texas case law clearly holds that if there is a bona fide dispute between the alleged victim and the theft defendant over ownership of the property, the evidence is *legally* insufficient to support the charge. *Bryant v. State*, 627 S.W.2d 180, 183 (Tex. Crim. App. 1982); *see also Roper v. State*, 917 S.W.2d 128, 132-33 (Tex. App. 1996) (ordering acquittal in theft case that was based on "a simple case of a civil contract dispute").

To establish probable cause, Hattox must show that the facts and circumstances within his knowledge and of which he had reasonably trustworthy information were sufficient to cause a prudent person to believe that Mr. Bokor had committed the offense of theft. *See Britton v. State*, 578 S.W.2d 685, 689 (Tex. Crim. App. 1978), *cert. denied*, 444 U.S. 955 (1979). The facts and circumstances, however,

wholly fail to support a belief that the alleged victim was the owner of the property in question.

Hattox based the theft charge on a real estate transaction that involved Mr. Bokor, his wife, and an individual named David Trimble. (1 R. at 100-103, 105). Specifically, Trimble was purchasing certain real property from Mr. Bokor and his wife pursuant to a contract for deed, and it appears that Hattox accused Mr. Bokor of improperly retaining the payments he received pursuant to the contract.

Yet, it is beyond dispute that Trimble had not satisfied all of his obligations under the terms of the contract. (1 R. at 101-103). Furthermore, it is beyond dispute that, as of the date of the alleged offense, Mr. Bokor was under no legal obligation to deed the property to Trimble or refund the payments received from Trimble. (1 R. at 101-103, 105).

At best from Hattox's point of view, there was a bona fide dispute between Mr. Bokor and Trimble concerning ownership of the property. If so, the evidence was nonetheless legally insufficient to support a theft charge. (Frankly, the record doesn't even support the conclusion that there was a bona fide dispute. Trimble had not fully performed his contractual obligations, and Mr. Bokor had not breached the contract.) Thus, the state appellate court, after reviewing the entire trial record, held that the evidence was "legally insufficient" to support a theft conviction, and the court rendered a judgment of acquittal. *Bokor*, 114 S.W.3d at 561.

"A prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested." *Buckley*, 509 U.S. at 274. Thus, *Buckley* establishes probable cause as the touchstone of an absolute immunity defense. *Buckley*, however, also acknowledges that absolute immunity protects a prosecutor's decision to

bring an indictment even if the indictment is not supported by probable cause. *Buckley*, 509 U.S. at 274 n.5. Thus, one may be tempted to argue that the lack of probable cause for Mr. Bokor's theft charge is irrelevant. Clarification from this Court would be appropriate.

Although Mr. Bokor's complaint includes a state law claim of malicious prosecution, his § 1983 claim is based on the *arrests* described above. In other words, each arrest deprived Mr. Bokor of his right to be secure in his person from unreasonable searches and seizures. U.S. CONST. amend. IV. Each arrest deprived Mr. Bokor of his liberty without due process of law. U.S. CONST. amend. XIV, § 1. In fact, Hattox did not secure a theft indictment until two weeks after Mr. Bokor had been arrested for the charge, and Mr. Bokor had remained incarcerated during the intervening time period. (1 R. at 73, 99, 102, 103).

What if Hattox had decided not to seek an indictment after Mr. Bokor had spent two weeks or longer in jail? Mr. Bokor could not base a civil suit on a decision to seek an indictment, but Mr. Bokor's arrest would still have deprived him of his liberty. The deprivation would not be any less real because the prosecutor decided not to seek an indictment, and the deprivation could still underlie a § 1983 claim.

Thus, the case at bar presents the following question: To what extent, if any, does a decision to bring an indictment shield pre-indictment conduct with absolute immunity when probable cause does not exist? This is an important question of federal law for which there is no clear answer. Therefore, Mr. Bokor respectfully asks this Court for clarification.

It is true that qualified immunity may protect a prosecutor when absolute immunity doesn't apply. *Buckley*,

509 U.S. at 273-74. The District Court, of course, did not address the issue of qualified immunity, as the court ruled that Hattox was protected by absolute immunity. In any event, the record does not establish an entitlement to qualified immunity.

In the present case, Hattox would be protected by qualified immunity only upon a showing that a reasonable prosecutor in his position could have believed that Mr. Bokor's arrests were lawful, in light of the clearly established law and the information possessed by Hattox. *See Hunter v. Bryant*, 502 U.S. 224, 227 (1991). It is not at all clear that a reasonable prosecutor in Hattox's position would have concluded that he had the legal authority to initiate an arrest for charge(s) that the prosecutor had no legal authority to prosecute. Similarly, it is not at all clear that a reasonable prosecutor in Hattox's position would have concluded that probable cause existed to arrest Mr. Bokor for theft given the facts and the applicable law.

It is reasonable to expect a prosecutor to know the limits of his jurisdiction. It is reasonable to expect a prosecutor to know the law he is empowered to enforce. Either Hattox was plainly incompetent or he knowingly acted outside the scope of the law. The qualified immunity defense does not protect the plainly incompetent or those who knowingly violate the law. *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

CONCLUSION

For the foregoing reasons, Jeffrey Bokor respectfully asks this Court to grant his petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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Dated: February 12, 2007

APPENDIX A

Judgment of Court of Appeals

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-10953

JEFFREY LEE BOKOR,
Plaintiff – Appellant,

versus

RICHARD L. HATTOX, ET AL,
Defendants,

RICHARD L. HATTOX,
Defendant – Appellee.

Appeal from the United States District Court
for the Northern District of Texas, Fort Worth Division
USDC No. 4:03-CV-426

Before BARKSDALE, DeMOSS, and PRADO, Circuit Judges.

PER CURIAM:*

*AFFIRMED. *See* 5TH CIR. R. 47.6.

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

APPENDIX B

Opinion of District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

JEFFREY LEE BOKOR	§	
	§	CIVIL ACTION NO.
VS.	§	4:03-CV-426-Y
	§	("ECF")
RICHARD L. HATTOX	§	

ORDER GRANTING DEFENDANT HATTOX'S
MOTION FOR SUMMARY JUDGMENT

Pending before the Court is defendant Richard L. Hattox's Motion for Summary Judgment [doc. # 15-1], filed August 9, 2004. Having carefully reviewed the motion and response, the Court finds that the motion should be GRANTED.

In 1999 an information for stalking signed by Hattox was filed in the County Court of Hood County, Texas, against plaintiff Jeffrey Lee Bokor. In 2000, an indictment was issued against Bokor for felony theft and stalking. Bokor avers that the alleged victim of the felony theft offense spoke with Hattox prior to the issuance of the indictment. On May 19, 2003, Bokor filed suit in this Court against Hattox for malicious prosecution and violations of Bokor's constitutional rights under 42 U.S.C. § 1983. Hattox moves for summary judgment, arguing that, as district attorney of Hood County, Texas, he is entitled to absolute immunity. Bokor contends that Hattox is not entitled to such immunity, arguing that Hattox, as the district attorney for the 355th Judicial District, could not file and prosecute misdemeanor cases in the Hood County Court.

Summary judgment is proper when the record establishes "that there is no genuine issue as to any material

fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). An issue is considered "genuine" if "it is real and substantial as opposed to merely formal, pretended, or a sham." *Bazan v. Hidalgo Cty.*, 246 F.3d 481, 489 (5th Cir. 2001) (citing *Wilkinson v. Powell*, 149 F.2d 335, 337 (5th Cir. 1945)). Facts are considered "material" if they "might affect the outcome of the suit under governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). To determine whether there are any genuine issues of material fact, the Court must first consult the applicable substantive law to ascertain what factual issues are material. *Lavespere v. Niagra Mach. & Tool Works*, 910 F.2d 167, 178 (5th Cir. 1990). Next, the Court must review the evidence on those issues, viewing the facts in the light most favorable to the nonmoving party. *Id.*; *Newell v. Oxford Mgmt. Inc.*, 912 F.2d 793, 795 (5th Cir. 1990); *Medlin v. Palmer*, 874 F.2d 1085, 1089 (5th Cir. 1989).

In making its determination on the motion, the Court must look at the full record including the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits. *See* FED. R. CIV. P. 56(c); *Williams v. Adams*, 836 F.2d 958, 961 (5th Cir. 1988). Rule 56, however, "does not impose on the district court a duty to sift through the record in search of evidence to support" a party's motion for, or opposition to, summary judgment. *Skotak v. Tenneco Resins, Inc.*, 953 F.2d 909, 915-16 & n.7 (5th Cir. 1992). Thus, parties should "identify specific evidence in the record, and . . . articulate" precisely how that evidence supports their claims. *Forsyth v. Barr*, 19 F.3d 1527, 1536 (5th Cir. 1994). Further, the Court's function is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. *See Anderson* 477 U.S. at 249.

To prevail on a motion for summary judgment, the moving party has the initial burden of demonstrating that

there is no genuine issue as to any material fact and that he is entitled to judgment as a matter of law. *See Celotex Corp v. Catrett*, 477 U.S. 317, 323 (1986). A defendant moving for summary judgment may submit evidence that negates a material element of the plaintiff's claim or show that there is no evidence to support an essential element of the plaintiff's claims. *See Celotex Corp.*, 477 U.S. at 322-24; *Crescent Towing and Salvage Co. v. M/V Anax*, 40 F.3d 741, 744 (5th Cir. 1994); *Lavespere*, 910 F.2d at 178.

To negate a material element of the plaintiff's claim, the defendant must negate an element that would affect the outcome of the action. *See Anderson*, 477 U.S. at 247. If the defendant moves for summary judgment alleging no evidence to support an essential element of the plaintiff's claim, the defendant need not produce evidence showing the absence of a genuine issue of fact on that essential element. Rather, the defendant need only show that the plaintiff, who bears the burden of proof, has adduced no evidence to support an essential element of his case. *See Celotex*, 477 U.S. at 325; *Teply v. Mobil Oil Corp.*, 859 F.2d 375, 379 (5th Cir. 1988).

When the moving party has carried its summary-judgment burden, the respondent must go beyond the pleadings and by his own evidence set forth specific facts showing there is a genuine issue for trial. FED. R. CIV. P. 56(e). This burden is not satisfied by creating some metaphysical doubt as to the material facts, by conclusory allegations, by unsubstantiated assertions, or by only a scintilla of evidence. *See Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994). If the evidence is merely colorable or is not significantly probative, summary judgment may be granted. *See Anderson*, 477 U.S. at 249-50.

"[T]he actions of a prosecutor are not absolutely immune merely because they are performed by a prosecutor." *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993). To

determine whether a government official is entitled to absolute immunity or qualified immunity, the United States Supreme Court has indicated that the courts must take a "functional approach." *Burns v. Reed*, 500 U.S. 478, 486 (1991). In applying such an approach, a court is to look to "the nature of the function performed, not the identity of the actor who performed it." *Forrester v. White*, 484 U.S. 219, 229 (1988); *see Buckley*, 509 U.S. at 269. If a prosecutor is acting in his role as advocate for the state in initiating a prosecution and in presenting the state's case, then he will be entitled to absolute immunity. *See Buckley*, 509 U.S. at 273. However, "[a] prosecutor's administrative duties and those investigatory functions that do not relate to an advocate's preparation for the initiation of a prosecution or for judicial proceedings are not entitled to absolute immunity." *Id.* "[T]he official seeking absolute immunity bears the burden of showing that such immunity is justified for the function in question." *Burns*, 500 U.S. at 486.

To succeed on his motion for summary judgment, Hattox has the burden of demonstrating that Bokor's claims against him arose out of his role as an advocate for the State in prosecuting Bokor for alleged misdemeanor crimes. Bokor, however, argues that Hattox is not entitled to absolute immunity because state law did not empower Hattox to bring the charges against him. The United States Court of Appeals for the Second Circuit addressed this very issue in *Barr v. Abrams*, 810 F.2d 358 (2d Cir. 1987). In *Barr*, the court stated:

> . We are persuaded . . . that a crabbed reading of *Imbler* [*v. Pachtman*, 424 U.S. 409 (1976)], and a holding that a prosecutor is without absolute immunity the moment he strays beyond his jurisdictional limits, would do violence to its spirit. The purpose of the immunity rule is to give public officials entrusted with sensitive tasks a protected

> area of discretion within which to carry out their responsibilities. . . .
>
> It does not follow that the issue whether a prosecutor is acting within his jurisdiction has no relevance to the type of immunity he enjoys. In *Stump v. Sparkman*, 435 U.S. 349, 356 . . . (1978), the Supreme Court stated that judges are absolutely immune from § 1983 actions only for judicial acts for which they have at least a semblance of jurisdiction. Where a judge proceeded in "the clear absence of all jurisdiction," the Court ruled, a different result would be in order.
>
> We believe the same rule should apply here. Since it is well settled that the immunity of prosecutors is based on the same considerations that underlie the immunity of judges, *Imbler*, 424 U.S. at 422 . . ., and since there is no functional basis for according a greater degree of protection to prosecutors than to judges, a dissimilar standard would be incongruous. *See Lerwill v. Joslin*, 712 F.2d 435, 438 (10th Cir. 1983).
>
> Thus, unless a prosecutor proceeds in the clear absence of all jurisdiction, absolute immunity exists for those prosecutorial activities intimately associated with the judicial phase of the criminal process. Conversely, where a prosecutor acts without any colorable claim of authority, he loses the absolute immunity he would otherwise enjoy.

Barr, 810 F.2d at 361.

Bokor cannot show that Hattox has "proceed[ed] in the clear absence of all jurisdiction" or that he acted "without any colorable claim of authority." The Texas Code of

Criminal Procedure provides that "[d]istrict courts and criminal district courts shall have original jurisdiction in criminal cases of the grade of felony, of all misdemeanors involving official misconduct, and of misdemeanor cases transferred to the district court." TEX. CODE CRIM. PROC. ANN. art. 4.05 (2004). County courts "shall have original jurisdiction of all misdemeanors of which exclusive original jurisdiction is not given to the justice court, and when the fine to be imposed shall exceed five hundred dollars." *Id.* at art. 4.07. The underlying stalking charges against Bokor are misdemeanor offenses that did not involve official misconduct and that were not transferred to the district court. Jurisdiction over the underlying charges would therefore reside with the county court.

However, the Texas Constitution provides that:

> An information is a written instrument presented to a court by *an attorney for the State* charging a person with the commission of an offense . . . The presentment of an indictment or information to a court invests the court with jurisdiction of the cause.

Tex. Const. art. V, § 12(b) (emphasis added). Hattox, as an attorney for the state, is therefore constitutionally given the authority to issue informations and indictments. Defective informations and indictments are "sufficient to vest [a] trial court with jurisdiction." *State v. Chardin*, 14 S.W.3d 829, 830 (Tex. App.—Austin 2000, pet. filed). Texas courts have consistently interpreted the Texas Constitution to provide that, where informations and indictments filed in county court allege felony offenses, jurisdiction still vests regardless of the defect. *See id*; *Studer v. State*, 799 S.W.2d 263, 267 (Crim. App. 1990); *Cook v. State*, 902 S.W.2d 471, 477 (Crim. App. 1995). Since Texas courts consider informations for felony charges filed in misdemeanor courts to be jurisdictionally sound, the Court concludes that misdemeanor

informations signed by a state attorney with jurisdiction over felony cases to also be jurisdictionally sound. Hattox's involvement with Bokor's stalking charges was therefore sufficient to confer jurisdiction over Bokor in county court.

Furthermore, the Texas Code of Criminal Procedure, article 21, provides that an information is sufficient if it is "signed by the district or county attorney, officially." TEX. CODE CRIM. PROC. ANN. art. 21.21 (2004). The Court cannot conclude that a district attorney with the authority to file felony charges somehow lacks the authority to file charges for misdemeanors. Bokor's arguments that Hattox lacked the jurisdictional authority to sign, issue, or be involved in the stalking charges against him are therefore without merit. Hattox, as an advocate for the State, is entitled to absolute immunity, and his motion for summary judgment should be granted.

Therefore, it is ORDERED that Hattox's Motion for Summary Judgment [doc. # 15-1] is GRANTED.

SIGNED November 3, 2004.

/s/_____
TERRY R. MEANS
UNITED STATES DISTRICT
JUDGE